84-564

No.

Office - Supreme Court, U.S.
FILED
OCT 9 1984
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

THE GERMANTOWN HOSPITAL AND MEDICAL CENTER, ET AL.
and
MEMORIAL OSTEOPATHIC HOSPITAL, ET AL.,
*Petitioners**

v.

MARGARET M. HECKLER, SECRETARY DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROLAND MORRIS, *Attorney of Record*
JANE D. ELLIOTT
CAROLYN MILLS
Attorneys for Petitioners

DUANE, MORRIS & HECKSCHER
One Franklin Plaza
Philadelphia, Pennsylvania 19102
(215) 854-6300

October 9, 1984

*See inside cover for complete list of Petitioners.

46pp

The Germantown Hospital and Medical Center
Northeastern Hospital
Bryn Mawr Hospital
Doylestown Hospital
Methodist Hospital
Frankford Hospital
Mercy Catholic Medical Center
Crozer-Chester Medical Center
Metropolitan Hospital
Institute of Pennsylvania Hospital
Hahnemann Hospital
Abington Hospital
Memorial Osteopathic Hospital
Memorial Hospital — Roxborough
Paoli Memorial Hospital
Pennsylvania Hospital
James C. Giuffre Medical Center
Hospital of the Medical College of Pennsylvania
Albert Einstein Medical Center
Thomas Jefferson University Hospital
Hospital of the University of Pennsylvania
Lower Bucks Hospital
Mercy Hospital of Wilkes-Barre
Robert Packer Hospital
Troy Community Hospital
Community Medical Center
Berwick Hospital
Fulton County Medical Center
Harrisburg Hospital
Sunbury Community Hospital
Gnaden Huetten Memorial Hospital
Gnaden Huetten Nursing and Convalescent Center
Gnaden Huetten Home Health Agency
Pottstown Memorial Medical Center
Mercy Hospital — Scranton
Soldiers and Sailors Memorial Hospital
Williamsport Hospital
Centre Community Hospital
Geisinger Medical Center
Pottsville Hospital and Warner Clinic
Sunbury Community Hospital SNF
St. Luke's Hospital, Bethlehem
Muhlenberg Medical Center and SNF
Titusville Hospital
Charles Cole Memorial Hospital
Ohio Valley General Hospital
Washington Hospital
Sewickley Hospital
Miners Hospital of Northern Cambria
Lee Hospital
J. C. Blair Memorial Hospital
Greene County Memorial Hospital
Eye and Ear Hospital of Pittsburgh
Clarion Hospital
Allegheny General Hospital
Braddock General Hospital
Hamot Medical Center
DuBois Hospital
Spencer Hospital
Punxsutawney Area Hospital
Maple Avenue Hospital Association
Memorial Hospital of Bedford County
Latrobe Hospital
Indiana Hospital
Franklin Hospital
Corry Memorial Hospital Association
Brookville Hospital
Allegheny Valley Hospital
Mercy Hospital — Pittsburgh
North Hills Passavant Hospital
Meadville City Hospital
Shenango Valley Osteopathic Hospital
Mercy Hospital — Johnstown
Evangelical Community Hospital
Altoona Hospital
Conemaugh Valley Memorial Hospital
Magee-Womens Hospital
Butler County Memorial Hospital
Montefiore Hospital Association of Western Pennsylvania
Lewistown Hospital
Hospital Association of Pennsylvania
Petitioners

QUESTION PRESENTED

Does Section 106 of the Tax Equity and Fiscal Responsibility Act of 1982 violate the due process clause of the Fifth Amendment by repudiating contractual obligations owed by the government to hospitals?

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Petitioners

v.

MARGARET M. HECKLER, SECRETARY DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners Germantown Hospital and Medical Center, and Memorial Osteopathic Hospital, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, dated July 10, 1984. After a hearing in which two actions were consolidated, the Court of Appeals upheld the judgments of the United States District Courts for the Eastern District and the Middle District of Pennsylvania.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 738 F.2d beginning at page 631 and is reproduced in the appendix to this Petition, commencing at page 1a. The opinions and judgments of the United States District Court for the Eastern and Middle Districts of Pennsylvania were not published and are reproduced in the appendix, commencing at pages 5a and 19a, respectively.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on July 10, 1984. This petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1)

STATUTORY PROVISIONS INVOLVED

Definition of Reimbursable "Reasonable Costs" under Title XVIII of the Social Security ("Medicare") Act

42 U.S.C. § 1395x(v)(1)(A):

> The reasonable cost of any services shall be the cost actually incurred, excluding therefrom any part of incurred costs found to be unnecessary in the efficient delivery of needed health services, and shall be determined in accordance with regulations establishing the method or methods to be used, and the items to be included, in determining such costs for various types or classes of institutions, agencies, and services. . . . In prescribing the regulations referred to in the preceding sentence, the Secretary shall consider, among other things, the principles generally applied by national organizations or established prepayment organizations (which have developed such principles) in computing the amount of payment, to be made by persons other than the recipients of services, to providers of services on account of services furnished to such recipients by such providers. Such regulations may

provide for determination of the costs of services on a per diem, per unit, per capita, or other basis, may provide for using different methods in different circumstances, may provide for the use of estimates of costs of particular items or services, may provide for the establishment of limits on the direct or indirect overall incurred costs or incurred costs of specific items or services or groups of items or services to be recognized as reasonable based on estimates of the costs necessary in the efficient delivery of needed health services to individuals covered by the insurance programs established under this subchapter, and may provide for the use of charges or a percentage of charges where this method reasonably reflects the costs. Such regulations shall (i) take into account both direct and indirect costs of providers of services (excluding therefrom any such costs, including standby costs, which are determined in accordance with regulations to be unnecessary in the efficient delivery of services covered by the insurance programs established under this subchapter) in order that, under the methods of determining costs, the necessary costs of efficiently delivering covered services to individuals covered by the insurance programs established by this subchapter will not be borne by individuals not so covered, and the costs with respect to individuals not so covered, will not be borne by such insurance programs, and (ii) provide for the making of suitable retroactive corrective adjustments where, for a provider of services for any fiscal period, the aggregate reimbursement produced by the methods of determining costs proves to be either inadequate or excessive.

Section 603 of the Hospital Survey and Construction ("Hill-Burton") Act of 1946

42 U.S.C. § 291c(e):

The Surgeon General, with the approval of the Federal Hospital Council and the Secretary of Health and Human Services, shall by general regulations prescribe

* * * *

(c) that the State plan shall provide for adequate hospitals, and other facilities for which aid under this part is available, for all persons residing in the State, and adequate hospitals (and such other facilities) to furnish needed services for persons unable to pay therefor. Such regulations may also require that before approval of an application for a project is recommended by a State agency to the Surgeon General for approval under this part, assurance shall be received by the State from the applicant that (1) the facility or portion thereof to be constructed or modernized will be made available to all persons residing in the territorial area of the applicant: and (2) there will be made available in the facility or portion thereof to be constructed or modernized a reasonable volume of services to persons unable to pay therefor, but an exception shall be made if such a requirement is not feasible from a financial viewpoint.

Section 106 of the Tax Equity and Fiscal Responsibility Act of 1982

Pub.L. No. 97-248, 96 Stat. 337 (codified at 42 U.S.C. § 1395x(v)(1)(M)):

(a) Section 1861(v)(1) of the Social Security Act is amended by adding at the end the following new subparagraph:

"(M)Such regulations shall provide that costs respecting care provided by a provider of services, pursuant to an assurance under title VI or XVI of the Public Health Service Act that the provider will make available a reasonable volume of services to persons unable to pay therefor, shall not be allowable as reasonable costs.".

(b) The amendment made by subsection (a) shall be effective with respect to any costs incurred under title XVIII of the Social Security Act, except that it shall not apply to costs which have been allowed prior to the date of the enactment of this Act pursuant to the final court order affirmed by a United States Court of Appeals.

STATEMENT OF THE CASE

The fundamental issue presented by this Petition is whether the federal government by retroactive legislation can repudiate its obligation to pay hospitals the cost of caring for Medicare patients. Petitioners are a group of Pennsylvania hospitals that entered into Medicare contracts with the government. Pursuant to these Medicare contracts and federal regulations promulgated by the Department of Health and Human Services, the government contracted to pay the hospitals the full cost (both direct and indirect) of treating Medicare beneficiaries if the hospitals would accept them as patients. After the hospitals agreed to these terms and provided care to thousands of Medicare patients, the government refused to reimburse the hospitals for the full cost of the services they rendered.

When other hospitals throughout the country succeeded in obtaining judicial relief from the government's action, the government successfully sought retroactive legislation in an attempt to legitimize its position. Section 106 of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA") purported to permit the government to refuse to honor its contractual obligation to hospitals to reimburse them for the full cost of the care they had provided to Medicare patients. Petitioners submit that Section 106 unconstitutionally impairs their vested contractual rights in violation of the due process clause of the Fifth Amendment.

Section 106 of TEFRA Prohibits Reimbursement for Hill-Burton Care Costs

A. *The Hill-Burton Program*

Section 106 of TEFRA provides that the Medicare program shall not reimburse hospitals for the costs they incur in treating indigent patients who cannot afford to pay for their medical care. Hospitals provide this uncompensated care to indigents in fulfillment of their obligations under the Hospital Survey and Construction Act of 1946, 42 U.S.C. § 291 *et seq.* (1982), commonly known as the Hill-Burton Act. Congress created the Hill-Burton program, a federally funded program administered by the States, to subsidize the construction and

modernization of public and private, nonprofit hospitals. The program was intended to correct the inadequate and uneven geographical distribution of hospitals throughout the United States. Under the Hill-Burton program, hospitals received financial assistance in the form of grants, low interest loans, loan guarantees and interest subsidies for the modernization and expansion of their physical plants. In return for receiving Hill-Burton assistance, hospitals agreed to provide "a reasonable volume of services to persons unable to pay therefor. . . ." 42 U.S.C. § 291c(e) (1982).

The first federal regulations promulgated pursuant to the Hill-Burton Act were published in 1947. Consistent with the terms of the Act, the 1947 regulations left the actual volume of indigent care to the hospitals' discretion. They provided that the cost of such care might be paid for by public funds, charitable contributions, or the hospital itself. 42 C.F.R. § 53.1 *et seq.* (1947). Between 1947 and 1971, the statute and regulations pertaining to the Hill-Burton indigent care obligation remained in effect with no significant changes. Beginning in 1972, however, revised Hill-Burton regulations promulgated after the majority of Hill-Burton funds had been disbursed, for the first time required hospitals to provide and finance fixed quantities of indigent care. These requirements increased in subsequent regulations and by 1979, hospitals were mandated to provide annually a volume of indigent care equal either to 3% of their operating costs or 10% of all federal assistance received, inflated each year by a percentage equal to the change in the medical care component of the consumer price index. 42 C.F.R. § 124.503(a)(ii) (1983). By regulations promulgated in 1974, hospitals that had accepted Hill-Burton assistance also were *required* to participate in the Medicare program. 42 C.F.R. § 53.113(d)(2) (1983).

B. *The Medicare Program.*

The Medicare program was created by Congress in 1965 as a national health insurance program for the aged. 42 U.S.C. § 1395 *et seq.* (1982). Before 1974, Hill-Burton assisted hospitals which had incurred indigent care obligations were not required to treat Medicare patients. As is set forth above, however,

Hill-Burton regulations promulgated in 1974 suddenly required hospitals that had at one time received Hill-Burton funds to participate in the Medicare program. Under the Medicare program, administered by the Department of Health and Human Services, the federal government enters into written contracts with health care facilities to provide medical care to Medicare beneficiaries. The health care facilities agree in turn to accept Medicare reimbursement as full payment for the care they render to Medicare patients. During the years at issue in this Petition, the Medicare Act required the government to reimburse hospitals for the "reasonable costs", *both direct and indirect*, of providing care to Medicare beneficiaries.[1] 42 U.S.C. § 1395f(b) (1982). For example, Medicare reimbursed hospitals for their costs of admissions, billings, workman's compensation, insurance, depreciation on assets (including assets financed with Hill-Burton funds) and interest expense on current and capital indebtedness. 42 C.F.R. § 405.402; § 405.415-.419 (1983).

C. *Section 106 of TEFRA Was Enacted To Reduce Government Expenditures.*

When the volume of mandated Hill-Burton indigent care increased dramatically as a result of the 1974 and 1979 regulations, hospitals sought reimbursement under the Medicare program for its share of the cost of fulfulling the indigent care obligations just as other private and insured patients bear their share of this indirect cost. The Department of Health and Human Services took the position that Hill-Burton care costs were not reimbursable as a "reasonable cost" under Medicare. In 1981, however, the Court of Appeals for the Fifth Circuit held that the expense incurred by hospitals in fulfilling their indigent care obligation was in fact reimbursable under Medicare as a "reasonable cost" of providing care to Medicare patients. The Court reasoned that hospitals' indigent care obligation was the

1. In 1983, amendments to the Social Security Act revised the system of reimbursement for most hospitals. The revised system was not in effect during the years at issue in this Petition, however. Thus, the amendments are immaterial. Section 601 of the Social Security Amendments of 1983, Pub.L.No. 98-21, 97 Stat. 149 (codified in scattered sections of 26 and 42 U.S.C.).

cost the hospitals incurred in obtaining construction financing under the Hill-Burton program and thus was analogous to interest on a construction loan, which is reimbursed by Medicare. *Presbyterian Hospital of Dallas v. Harris*, 638 F.2d 1381 (5th Cir.), *cert. denied*, 454 U.S. 940 (1981). A number of other federal courts followed the reasoning of the Fifth Circuit and held that Hill-Burton care costs were an allowable, reasonable cost under Medicare.[2]

The Department of Health and Human Services responded to the hospitals' success in the courts not only by appealing the adverse decisions but also by seeking legislation to support its position. Section 106 of TEFRA was enacted in 1982. It provided that "costs respecting . . . [Hill-Burton care] . . . shall not be allowable as reasonable costs." 42 U.S.C. § 1395x(v)(1)(M) (1982). The only exception to the provisions of Section 106 was the costs incurred by the plaintiff hospital in the *Presbyterian Hospital of Dallas* case for its 1976 fiscal year. The enactment of Section 106 resulted in the reversal on appeal of most of the district court decisions favorable to the hospitals.[3]

Petitioners are a group of Pennsylvania hospitals that challenged the disallowance of Medicare reimbursement for Hill-Burton indigent care costs for the fiscal year 1980 by appealing the disallowance to the Provider Reimbursement Review Board

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2. *Rapides General Hospital v. Matthews*, 435 F. Supp. 384 (W.D. La. 1977), *vacated and rev'd on other grounds*, No. 77-3125 (5th Cir. 1978) (unpublished order); *St. James Hospital v. Harris*, 535 F. Supp. 751 (N.D. Ill. 1981), *rev'd* 698 F.2d 1337 (7th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S. Ct. 107 (1983); *Iredell Memorial Hospital, Inc. v. Schweiker*, 535 F. Supp. 795 (W.D. N.C. 1982), *rev'd*, 699 F.2d 196 (4th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S. Ct. 150 (1983); *Metropolitan Medical Center v. Harris*, 524 F. Supp. 630 (D. Minn. 1981), *rev'd*, 693 F.2d 775 (8th Cir. 1982); *Johnson County Memorial Hospital v. Schweiker*, 527 F. Supp. 1134 (S.D. Ind. 1981), *rev'd*, 698 F.2d 1347 (7th Cir. 1983), *cert. denied*, ___U.S. ___, 104 S. Ct. 73 (1983); *Memorial Hospital, et al. v. Schweiker*, Civil No. 80-67 (M.D. Fla., Oct. 20, 1981), *rev'd*, 706 F.2d 1130 (11th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 1275 (1984); *John Muir Memorial Hospital, Inc. v. Davis*, No. C-81-4731 EFL (N.D. Cal. Feb. 17, 1983), *rev'd*, 726 F.2d 1443 (9th Cir. 1984).

3. *Supra* note 2.

(the "PRRB"), as required by the Medicare statute. 42 U.S.C. § 1395oo (1982). By letter and decision dated October 15, 1982, the PRRB found that the newly enacted Section 106 of TEFRA prohibited reimbursement of the 1980 Hill-Burton care expenses. Appendix at 7a. Petitioners filed actions in the three federal judicial districts in Pennsylvania asserting that Section 106 of TEFRA constituted retroactive legislation that was unconstitutional. Proceedings in the Western District of Pennsylvania were stayed while the parties filed cross-motions for summary judgment in the Eastern District, *The Germantown Hospital and Medical Center, et al. v. Heckler*, No. 82-5016 (E.D. Pa. 1983), and the Middle District, *Memorial Osteopathic Hospital v. Heckler*, No. 82-1414 (M.D. Pa. 1984). Judges Cahn, in *Germantown Hospital*, and Muir, in *Memorial Osteopathic*, granted summary judgment in favor of the government and petitioners appealed both decisions to the Court of Appeals for the Third Circuit.

The two appeals to the Third Circuit were consolidated and oral argument was heard on June 18, 1984. On July 10, 1984, the Third Circuit, without performing an independent analysis of the issues raised by petitioners, relied on the decisions of 6th, 7th, 9th and 11th Circuits and held Section 106 of TEFRA constitutional.[4] Appendix at 4a. It is from the decision of the Third Circuit that the hospitals petition for a writ of certiorari.

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4. The Courts of Appeals for the 6th, 7th, 9th and 11th Circuits upheld the constitutionality of Section 106 by reviewing it only in relation to the Medicare program. The Courts did not examine the objectives of the Hill-Burton program or the administrative provisions of the Medicare Act. Consequently, they failed to appreciate the interplay between two complex statutory schemes in conjunction with the impact of Section 106 on hospitals.

REASON FOR GRANTING THE WRIT

The Decision of the Court of Appeals Conflicts, In Principle, With Decisions of this Court Because it Permits the United States to Abrogate its Contractual Obligations in Violation of the Fifth Amendment.

As a critical matter of public and governmental policy, persons contracting with the federal government are entitled to understand the scope of their contractual rights. The disposition of this case by the Third Circuit Court of Appeals has left the law in this area incomprehensible and has clouded long-standing precedent established by this Court. Until this case arose, the federal government could not repudiate contractual obligations for reasons of budgetary economy.

By permitting the federal government to repudiate its contractual obligations to hospitals under the Medicare program, Section 106 of TEFRA has impaired petitioners' contract rights in violation of the due process clause of the Fifth Amendment under clear prior precedent. The Court is requested to affirm this precedent.

When petitioner hospitals agreed to participate in the Medicare Program, they entered into contracts with the federal government evidencing their rights and obligations.[5] Under the Medicare contracts, petitioners agreed to treat Medicare patients in return for receiving reimbursement by the federal government for the costs of such care. Petitioners have rendered the requisite Medicare services under their contracts and have a vested contractual right to be reimbursed for the costs of these services, including Medicare's fair share of Hill-Burton indigent care costs.

This Court has held that "[r]ights against the United States arising out of a contract with it are protected by the Fifth Amendment." *Lynch v. United States*, 292 U.S. 571, 579 (1934). Petitioners' contractual right to be reimbursed for the cost of fulfilling their Hill-Burton care obligations constitutes pro-

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5. "An entity is an authorized Medicare provider by virtue of a contract, called an 1866 agreement, between it and the Secretary. Such contracts arise under § 1866 of the Social Security Act, 42 U.S.C. § 1395cc." *Pacific Coast Medical Enterprises v. Harris*, 633 F.2d 123, 125 n. 1 (9th Cir. 1980).

tected property.[6] Section 106 of TEFRA, by repudiating petitioners' vested rights under their Medicare contracts, deprives petitioners of their property without due process of law, violating the Fifth Amendment.

In Lynch, this Court struck down a law which permitted the federal government to refuse to honor insurance policies it had issued pursuant to the War Risk Insurance Act of 1917. The cost of the policies had become burdensome to the United States and in 1933 Congress repealed the War Risk Insurance Act. The plaintiffs in *Lynch*, beneficiaries of policies which the United States refused to honor, asserted that the government's refusal to honor the policies deprived them of their property without due process of law in violation of the Fifth Amendment. This Court agreed and held that "War Risk policies, being contracts, are property and create vested rights." *Id.* at 577. The Court stated,

> The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. (Citations omitted.) When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.

Id. at 579.

This Court also explained that "Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation." *Id.* at 580.

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6. Both Judge Cahn, in the *Germantown Hospital* case in the Eastern District, and Judge Muir, in the *Memorial Osteopathic Hospital* case in the Middle District, erroneously concluded, despite significant caselaw to the contrary, that hospitals' right to reimbursement under Medicare for reasonable costs is not contractual, but statutory. Even if this were true, it would not change the nature of petitioners' right to reimbursement, for a statutory right is a property right protected by the due process clause of the Fifth Amendment. *Clover Farms Dairy v. Brumbaugh*, 586 F.Supp. 1227 (M.D. Pa. 1984).

Section 106 was enacted by Congress for precisely the same reason that the legislation was struck down in *Lynch:* the federal government has attempted to reduce expenditures by repudiating its obligations to hospitals under their Medicare contracts. As *Lynch* demonstrates, Congress cannot by legislation destroy petitioners' contractual right to receive reimbursement for the costs they incurred, including Hill-Burton care costs, in rendering care to Medicare beneficiaries.

This Court reached a similar result in *Perry v. United States*, 294 U.S. 330 (1935), in which it held unconstitutional a statute permitting the federal government to alter the terms of certain government bonds. The terms of the bonds required that payment be made in gold; the new statute substituted legal tender for the gold payment. This Court said, "When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments." *Id.* at 352.

Lynch and *Perry* involved legislative action by Congress analogous to the enactment of Section 106 and are controlling in this case. This Court has made clear that rights derived from a contract with the federal government, such as petitioners' rights under their Medicare contracts, are constitutionally protected and that attempts by Congress to violate such rights by repudiating the governments' contractual obligations will not be countenanced. *See, United States Trust Company of New York v. New Jersey*, 431 U.S. 1 (1977); *W.B. Worthen Co. v. Thomas*, 292 U.S. 426 (1934); *Treigle v. Acme Homestead Association*, 297 U.S. 189 (1936); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, *reh'g denied*, 439 U.S. 886 (1978).

CONCLUSION

For the foregoing reason, petitioners pray that the Court issue a Writ of Certiorari to review the decision of the Court of Appeals for the Third Circuit.

Respectfully submitted,

ROLAND MORRIS
JANE D. ELLIOTT
CAROLYN MILLS
Attorneys for Petitioners

DUANE, MORRIS & HECKSCHER
One Franklin Plaza
Philadelphia, Pennsylvania 19102
(215) 854-6300

Appendix

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 83-1854

THE GERMANTOWN HOSPITAL AND MEDICAL CENTER, ET AL.
Appellants,

v.

MARGARET M. HECKLER, ET AL.
Appellees.

No. 84-5262

MEMORIAL OSTEOPATHIC HOSPITAL, ET AL.
Appellants,

vs.

MARGARET M. HECKLER, ET AL.
Appellees.

Argued June 18, 1984 Decided July 10, 1984

OPINION OF THE COURT

PER CURIAM.

Appellants herein challenge the constitutionality of § 106 of the Tax Equity and Fiscal Responsibility Act of 1982, 42 U.S.C. § 1395x(v)(1)(M).[1] This section prohibits a health service provider from receiving reimbursement under the Medicare Act for the costs of providing indigent care services under § 603 of the Hill-Burton Act, 42 U.S.C. § 291c(e). Because we conclude that the district courts below properly resolved the constitutional challenges against appellants, we affirm in both appeals.

Appellants are several hospitals, medical centers, and other health service providers who participate in both the Hill-Burton and Medicare programs. Under the Hill-Burton Act, 42 U.S.C. §§ 291-291o, the federal government provides grants, loans, and loan guarantees for the construction and modernization of medical facilities. To receive such funds, an otherwise qualified health service provider must give assurances that its Hill-Burton funded facilities will be made available for "a reasonable volume of [free medical] services to persons unable to pay therefor. . . ." 42 U.S.C. § 281c(e). Certain minimum levels of "reasonable" services have been established and health service providers with Hill-Burton facilities are required to participate in the Medicare program. 42 C.F.R. § 124.603(c)(1)(ii)(1983). The Medicare program is a system of national health insurance for the elderly and disabled. 42 U.S.C. §§ 1395-1395xx. Health service providers may receive reimbursement from the Department of Health and Human Services for the "reasonable cost" of both "direct and indirect" services rendered in favor of individuals covered by the Medicare program. *Id.* §§ 1395(f)(b)(1), 1395x(v)(1)(A). Section 1395x(v) defines reasonable costs and was amended in 1982 by § 106 of the Tax Equity and Fiscal Responsibility Act, 42 U.S.C. § 1395x(v)(1)(M). This new section provides that

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1. On motion of appellants, agreed to by appellee, the appeal at 84-5262 was consolidated with the appeal at 83-1854. The parties in 84-5262 relied on the briefs and arguments in 83-1854.

> costs respecting care provided by a provider of services, pursuant to an assurance under title VI . . . of the Public Health Service Act [the Hill-Burton Act] that the provider will make available a reasonable volume of services to persons unable to pay therefore, *shall not be allowable as reasonable costs.*

42 U.S.C. § 1395x(v)(1)(M)(emphasis added).

Prior to the enactment of § 106, appellants sought recovery of their Hill-Burton indigent care service costs as reasonable indirect costs under Medicare. The Department of Health and Human Services denied reimbursement, and the providers appealed to the Provider Reimbursement Review Board (PRRB). Before the PRRB rendered its decision, Congress enacted the Tax Equity and Fiscal Responsibility Act. The PRRB subsequently affirmed the department's denial of reimbursement on the basis of § 106. Appellants then sought review in the district courts below raising a series of constitutional challenges to § 106. The district courts entered summary judgment against appellants who now appear before this court raising the same challenges, to-wit: that § 106 is unconstitutional because it (1) impairs appellants' contract rights; (2) takes appellants' property without just compensation; and (3) constitutes invalid retroactive legislation.

During the past several years no fewer than eight federal courts of appeals have considered whether Hill-Burton indigent care costs are reimbursable as reasonable costs under the Medicare program. *John Muir Memorial Hospital, Inc. v. Davis*, 726 F.2d 1443 (9th Cir. 1984); *Harper-Grace Hospitals v. Schweiker*, 708 F.2d 199 (6th Cir. 1983); *Catholic Medical Center v. New Hampshire-Vermont Hospitalization Service, Inc.*, 707 F.2d 7 (1st Cir. 1983); *Memorial Hospital v. Heckler*, 706 F.2d 1130 (11th Cir. 1983), *cert. denied*, ___ U.S. ___ (52 U.S.L.W. 3610, Feb. 21, 1984); *Iredell Memorial Hospital, Inc. v. Schweiker*, 699 F.2d 196 (4th Cir.), *cert. denied*, ___ U.S. ___ (52 U.S.L.W. 3265, Oct. 3, 1983); *Johnson County Memorial Hospital v. Schweiker*, 698 F.2d 1347 (7th Cir.), *cert. denied*, ___ U.S. ___ (52 U.S.L.W. 3262, Oct. 3, 1983); *St. Mary of Nazareth Hospital Center v. Department of Health and*

Human Services, 698 F.2d 1337 (7th Cir.), *cert. denied*, ___U.S. ___ (52 U.S.L.W. 3263, Oct. 3, 1983); *Metropolitan Medical Center v. Harris*, 693 F.2d 775 (8th Cir. 1982); *Harper-Grace Hospitals v. Schweiker*, 691 F.2d 808 (6th Cir. 1982); *Presbyterian Hospital of Dallas v. Harris*, 638 F.2d 1381 (5th Cir.), *cert. denied*, 454 U.S. 940 (1981). Only one court of appeals has allowed for reimbursement, *Presbyterian Hospital of Dallas v. Harris*, 638 F.2d 1381 (5th Cir.), *cert. denied*, 454 U.S. 940 (1981), and that decision predated the 1982 enactment of the Tax Equity and Fiscal Responsibility Act. The specific constitutional objections raised by appellants in the cases before us now have been considered and uniformly rejected by no fewer than three of our sibling circuits in no fewer than five separate appeals. *John Muir Memorial Hospital, Inc. v. Davis*, 726 F.2d 1443 (9th Cir. 1984); *Harper-Grace Hospitals v. Schweiker*, 708 F.2d 199 (6th Cir. 1983); *Memorial Hospital v. Heckler*, 706 F.2d 1130 (11th Cir. 1983), *cert. denied*, ___ U.S. ___ (52 U.S.L.W. 3610, Feb. 21, 1984); *Johnson County Memorial Hospital v. Schweiker*, 698 F.2d 1347 (7th Cir.), *cert. denied*, ___ U.S. ___ (52 U.S.L.W. 3262, Oct. 3, 1983); *St. Mary of Nazareth Hospital Center v. Department of Health and Human Services*, 698 F.2d 1337 (7th Cir.), *cert. denied*, ___ U.S. ___ (52 U.S.L.W. 3263, Oct. 3, 1983).

For the reasons expressed both in the foregoing circuit court opinions and by the Honorable Edward H. Cahn in the district court opinion from which the appeal at 83-1854 was taken, *Germantown Hospital and Medical Center v. Heckler*, ___ F. Supp. ___, Civ. No. 82-5016 (E.D. Pa. 1983), we conclude that § 106 of the Tax Equity and Fiscal Responsibility Act, 42 U.S.C. § 1395x(v)(1)(M), is not constitutionally infirm. Accordingly, the judgments of the district courts will be affirmed as to both appeals.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE GERMANTOWN HOSPITAL
AND MEDICAL CENTER, et al.
Plaintiffs,

v.

MARGARET M. HECKLER, et al.
Defendants.

Civil No. 82-5016

OPINION

CAHN, J. September 30, 1983

This is an appeal from an administrative determination made by The Health and Human Services Provider Reimbursement Review Board (P.R.R.B.) that 12 Pennsylvania hospitals are not entitled to reimbursement under the Medicare program for the costs of free care they provided to indigents as required by the Hill-Burton Act, 42 U.S.C. § 291, *et seq.* Plaintiffs are 12 non-profit Pennsylvania hospitals, which have received federal construction subsidies under the Hill-Burton Act in exchange for their agreement to provide free care to indigents. 42 U.S.C.A. § 291c(e). The defendant is Margaret M. Heckler, Secretary of Health and Human Services (H.H.S.).

Plaintiff hospitals in this appeal challenge the constitutionality of Section 106 of the Tax Equity and Fiscal Responsibility Act (TEFRA), 42 U.S.C. § 1395x(v)(1)(M), which denies hospitals reimbursement from the Medicare program for the costs incurred in providing free care to indigents under the Hill-Burton Act, 42 U.S.C. § 291, *et seq.* Plaintiffs also challenge

the interpretation of TEFRA made by the P.R.R.B. in that they urge Section 106, even if adjudged to be constitutional, does not preclude their claims. Plaintiffs seek reimbursement for the costs they incurred in providing free medical care to indigents and seek an injunction against enforcement of Section 106 of TEFRA.

Plaintiffs and defendants have filed cross-motions for summary judgment.[1] After considering the motions, and briefs, and after hearing oral argument, I have determined that Section 106 of TEFRA does not violate the constitution and that the plaintiffs' interpretation of Section 106 is incorrect. There are no disputed factual issues in this matter. Therefore, defendants' motion for summary judgment will be granted and plaintiffs' motion for summary judgment will be denied.[2]

I. BACKGROUND

The Medicare Act (42 U.S.C. § 1395, *et seq.*) was enacted in 1965 and transferred to public expense the cost of providing health care to the aged. Under this act, hospitals enter into an agreement with H.H.S. to provide Medicare services to eligible individuals. The hospitals are entitled to reimbursement under Medicare for the "reasonable cost" of providing health care services to Medicare beneficiaries.

The Hill-Burton Act (42 U.S.C. § 291, *et seq.*) was originally enacted in 1946 to remedy the shortage and inadequacy of hospital facilities in the United States. Hospitals were required to make two assurances pursuant to 42 U.S.C. § 291c(e) in order to receive funds for construction and modernization of their facilities. The first was that health care institutions make available a reasonable amount of free services to indigents. The second assurance was that the hospitals would provide a community service open to all community residents.

In 1979, the Secretary promulgated Hill-Burton regulations (42 C.F.R. Sections 124.501, *et seq.*) which established

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[1]Defendants have also filed a Motion to Dismiss two hospital trade associations, The American Hospital Association and The Hospital Association of Pennsylvania for lack of standing.

[2]There is no need to decide defendants' motion to dismiss since the point is moot.

that hospitals must provide services to the indigent population at a level not less than 3 percent of "operating costs" or 10 percent of federal assistance received. The regulations further require that all Hill-Burton assisted facilities must participate in the Medicare program. 42 C.F.R. § 124.603(c)(1)(ii). In the first appellate case dealing with this issue, *Presbyterian Hospital of Dallas v. Harris*, 638 F.2d 1381 (5th Cir.), *cert. den.*, 454 U.S. 940 (1981), the court held that Hill-Burton contracted costs for indigent care are indirect costs to the hospitals and therefore reimbursable by Medicare.

As a result of this decision, the Secretary sought clarifying legislation from Congress which would exclude reimbursement of Hill-Burton indigent care costs under Medicare. Congress responded and passed Section 106(a) of TEFRA. Section 106 amended the Medicare Act by excluding such Hill-Burton costs from allowable costs under the Medicare program.

Section 106(b) provides that no Hill-Burton indigent care costs shall be reimbursable but that this exclusion "shall not apply to costs which have been allowed prior to the date of enactment of this Act pursuant to the final court order affirmed by a United States Court of Appeals." P.L. No. 97-248, § 106(b), 42 U.S.C.A. § 1395x (p. 426 1983 Supp.). This language according to H.H.S. means that the reimbursement allowed in the *Presbyterian Hospital* case is to be honored, but that no further reimbursement of Hill-Burton indigent care costs by the Medicare program is permissible.

II. PROCEDURAL HISTORY

Fiscal intermediaries serve under contract as agents of the Secretary of H.H.S. and determine each hospital's Medicare reimbursement for each fiscal year. If a hospital is dissatisfied with the decision of an intermediary, it may seek review by appealing to the P.R.R.B., an administrative arm of H.H.S.

On August 4, 1981, plaintiff hospitals filed a request to the P.R.R.B. for a hearing to challenge initial disallowance of Hill-Burton costs. The P.R.R.B. held a hearing on May 25, 1982, and filed a decision on October 15, 1982, which held that plaintiff hospitals are not entitled to Medicare reimbursement for Hill-Burton contractual costs. The P.R.R.B.'s decision re-

lied on Section 106 of TEFRA and its legislative history to support denial of plaintiff hospitals' claim for reimbursement:

> The provision is intended to clarify that Hill-Burton free care costs have never been, and are not, allowable for medicare reimbursement purposes.

[1982] U.S. Code Cong. & Ad. News 1211. Plaintiff hospitals filed suit on November 12, 1982, in this court to obtain judicial review of the P.R.R.B.'s decision. I have jurisdiction over this matter pursuant to 42 U.S.C. § 1395oo.

This suit is one of a series of suits brought by hospitals throughout the country challenging the denial of reimbursement for Hill-Burton free care costs. Final decisions have been reached by a number of courts of appeal as well as by numerous district courts.

III. DISCUSSION

A. *The Bases of Plaintiffs' Claims*

Plaintiff Hospitals contend that Section 106 of TEFRA is unlawful, arbitrary, capricious and unconstitutional because they are illegally being denied reimbursement for the reasonable costs of providing services to Medicare beneficiaries. In the first count, plaintiffs charge that by excluding the contractual costs of Hill-Burton indigent care from Medicare allowable costs, Section 106 results in the federal government's paying to them a rate for the care of Medicare beneficiaries which is so low that it constitutes a taking of property without just compensation.

In counts two and three, plaintiffs allege that the defendant's act of administering Section 106 alters and impairs the Medicare and Hill-Burton contracts of plaintiff hospitals and undermines their ability to fulfill their obligations under the contracts. Plaintiffs assert an estoppel theory and claim that the hospitals accepted Hill-Burton aid because they relied on the contractual understanding that providing indigent care was a prerequisite to their obtaining federal Hill-Burton assistance. Plaintiffs argue that the denial of reimbursement for Hill-Burton costs constitutes a breach of the Medicare and Hill-Burton contracts and results in the deprivation of plaintiffs' property

without just compensation in violation of the Fifth Amendment. Plaintiffs also argue that the application of Section 106 to hospitals that have pre-existing Hill-Burton and Medicare contracts constitutes a retroactive legislative enactment that is fundamentally unfair and a denial of due process in violation of the Fifth Amendment.

Plaintiffs aver in their fourth count that Medicare's refusal to pay its fair share of Hill-Burton costs results in a shifting of costs to non-Medicare patients in violation of the Medicare Act's prohibition against cross-subsidization of Medicare patients, 42 U.S.C. § 1395x(v)(1)(A) and 42 C.F.R. § 405.451. In addition, plaintiffs maintain that Medicare's refusal to pay is in "irreconcilable conflict with other express, underlying, fundamental precepts of the Medicare Act and is unconstitutional as a violation of due process under the Fifth Amendment of the Constitution."

The fifth count asserted by plaintiffs is that Congress' attempt to require federal courts to decide pending actions in which it is a party constitutes an unconstitutional interference with the role of the judiciary in violation of Article III of the Constitution which vests "the judicial power of the United States" in the federal courts.

Plaintiffs' sixth count is that Section 106(b) which denies Medicare reimbursement for Hill-Burton costs, except for past reimbursement to one hospital, constitutes unlawful special or selective legislation in violation of the due process and equal protection clauses of the Fifth Amendment.

The final count raised by plaintiffs is that the P.R.B.B.'s application of Section 106 of TEFRA constitutes action that is arbitrary, capricious, and does not comport with proper statutory interpretation.

B. *The P.R.R.B. Has Properly Interpreted Section 106*

Plaintiffs raise the statutory interpretation issue of whether Section 106 excludes Hill-Burton indigent care costs from Medicare reimbursement. This is a threshold issue which I must meet before addressing the constitutional issues. Plaintiffs argue that the Congressional intent behind Section 106 is not clear because Congress lacked consensus on whether or

not Hill-Burton costs are to be considered reimbursable indirect costs under the Medicare scheme. The statutory interpretation issue has repeatedly been decided against the plaintiffs. Following TEFRA's passage, a number of appellate courts have decided this issue against the plaintiffs.[3] The enactment of Section 106 of TEFRA and its legislative history reveal that Congress intended simply to "clarify that Hill-Burton free care costs have never been, and are not, allowable for Medicare reimbursement purposes." [1982] U.S. Code Cong. & Ad. News 1211.

I agree with the reasoning set forth in *St. Mary of Nazareth v. Schweiker*, 698 F.2d 1337 (7th Cir. 1983) which held:

> . . . section 106 is clear in that it is nothing more than the reaffirmation of longstanding policy that it was never the intent of Congress to allow Medicare payments to be used to reimburse hospitals for the percentage of free care they provide indigents in repayment of their obligations under the Hill-Burton Act. 698 F.2d at 1344.

Section 291c(e)(2) of the Hill-Burton Act authorizes regulations requiring the applicant hospital to assure that "there will be made available . . . a reasonable volume of services to persons unable to pay therefore . . ." The same section allows "an exception . . . if such a requirement is not feasible from a financial viewpoint."

These provisions read together suggest that Congress understood it was imposing a substantial financial obligation directly on hospitals, and thus allowed for relief from that obligation upon a showing of a lack of financial feasibility. Nothing in the Hill-Burton Act evidences a Congressional intent that the federal government is to become the financial underwriter of the hospitals' free care obligation.

In *St. Mary of Nazareth*, the court held that "the Hill-Burton Act and the Medicare Act embody separate and distinct federal programs and the legislative history of each re-

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[3]Iredell Memorial Hospital, Inc. v. Schweiker, 699 F.2d 196 (4th Cir. 1983); St. Mary of Nazareth v. Dept. of H. & H. Services, 698 F.2d 1337 (7th Cir. 1983); Metro. Med. Ctr. & Extended Care Fac. v. Harris, 693 F.2d 775 (8th Cir. 1982); Harper-Grace Hospitals v. Schweiker, 691 F.2d 808 (6th Cir. 1982), and Memorial Hosp. v. Heckler, 706 F.2d 1130 (11th Cir. 1983).

vealed that Congress never intended to allow the use of Medicare funds to reimburse hospitals for the Medicare percentage of the free care rendered to indigents under the Hill-Burton Act." (698 F.2d at 1344).

The court held further that:

> To reach any other conclusion would put the government in the anomalous position of acting as a permanent life support system for health care facilities who provide services for the indigent without requiring that the hospitals fulfill the contractual obligations they incurred when accepting Hill-Burton funds. This type of financial reimbursement advocated by the hospitals is totally inconsistent with the principles of the Hill-Burton Act. (*Id.*)

Plaintiffs argue that the circuit court decisions not in their favor be disregarded by this court since the Fifth Circuit has already set controlling precedent in the *Presbyterian Hospital* case. However, in response to the *Presbyterian* decision, the Medicare regulations were revised to state that Medicare would not pay the costs of uncompensated services furnished by a provider in fulfillment of a Hill-Burton free care obligation. The revision states:

> § 405.420 Bad debts, charity, and courtesy allowances.
> (b) Definitions . . .
> (2) *Charity allowances.* Charity allowances are reductions in charges made by the provider of services because of the indigence or medical indigence of the patient. Cost of free care (uncompensated services) furnished under a Hill-Burton obligation are considered as charity allowances.
> (g) *Charity allowances.* Charity allowances have no relationship to beneficiaries of the health insurance program and are not allowable costs. Those charity allowances include the costs of uncompensated services furnished under a Hill-Burton obligation. (Note: In accordance with Section 106(b) of Pub.L. 97-248 [enacted September 3, 1982], this sentence is effective with respect to any costs incurred under Title XVIII of the Social Security Act, except that it does not apply to costs which have been allowed prior to

> September 3, 1982, pursuant to a final court order affirmed by a United States Court of Appeals.)

42 C.F.R. § 405.420 (1982).

The effect of this revision was explained in the Federal Register which establishes that this rule is retroactive, except for those costs allowed in the *Presbyterian Hospital* case:

> III. Effective Date
>
> Section 106 of Pub.L. 97-248 is effective with respect to all costs incurred under Medicare, both before and after enactment of the amendment, except those specific costs allowed under court order in the Presbyterian Hospital decision. Consequently, this rule is applicable to all past disputes concerning Medicare disallowances of costs of free care furnished under a Hill-Burton obligation except those cost years specifically litigated in the Presbyterian Hospital case, as well as future treatment of these costs. Any Hill-Burton costs paid by Medicare under the principle of the Presbyterian decision, but not specifically litigated therein, are impacted by this statutory amendment. These cost reports will be reopened and the Hill-Burton free care costs will be disallowed.

47 Fed. Reg. 43656 at 43657 (1982).

The precedential value of *Presbyterian* has been further eroded because other circuit courts which have passed on the issue have rejected the *Presbyterian* reasoning that Hill-Burton care expenses are an indirect cost that hospitals incur to benefit all patients, including Medicare beneficiaries, and which are reimbursable under Medicare. *See* note 3, *supra*. Thus, on the statutory interpretation issue, it is clear that TEFRA and its supporting regulations exclude Medicare reimbursement for the costs incurred in providing free care to indigents.

C. *Section 106 of TEFRA is Constitutional*

Plaintiffs allege generally that the application of Section 106 violates the Fifth Amendment's prohibition against the taking of property without just compensation and without due process of law. Plaintiffs argue that Section 106 unconstitutionally impairs the providers' contractual rights under both the

Hill-Burton and the Medicare contracts to which they are parties with the federal government. As consideration for the receipt of federal Hill-Burton funds for hospital construction, the providers gave an assurance that they would furnish a reasonable volume of health care to indigents. 42 U.S.C. § 291c(e). At the time of the enactment of the Hill-Burton Act in 1946, the volume of indigent care was left to the discretion of the hospitals. Subsequent regulations promulgated by the Secretary in 1972 and 1979 prescribed set levels of indigent care that the hospitals are required to provide and further required Hill-Burton assisted facilities to participate in the Medicare program. 42 C.F.R. §§ 53.111, 53.113 and §§ 124.503 and 124.603.

Section 106 imposed a further obligation on the providers because it mandates that they must absorb the Hill-Burton indigent care expenses and not be reimbursed by Medicare. According to plaintiffs, this will force the hospitals either to operate at a loss, or pass the cost on to other patient groups in violation of the Medicare Act which specifically forbids cross-subsidization. 42 U.S.C. § 1395x(v)(1)(A). Thus the plaintiffs claim that the federal government has altered and impaired the providers' Hill-Burton contracts because the government has imposed additional obligations on the providers long after its own performance on the contracts was completed. This impairment of providers' rights under the Hill-Burton contracts, according to plaintiffs, amounts to a deprivation of property in violation of the due process clause of the Fifth Amendment. *Lynch v. United States*, 292 U.S. 571 (1934).

Plaintiffs cite *Lynch* to illustrate the principle that Congress cannot repudiate the contractual obligations of the federal government to the providers under their Hill-Burton and Medicare contracts. In *Lynch*, during World War I, the federal government issued renewable contracts of insurance against death or disability for which the insureds paid favorable monthly premiums. The insurance policies were issued pursuant to the War Risk Insurance Act of 1917 and the government incurred significant expense in making such insurance available to the public. By 1933, the costs of the policies became burdensome to the United States and Congress enacted legislation that effectively repealed the War Risk Insurance Act. The plaintiffs in *Lynch* were beneficiaries of policies that had been issued

under the Act and which the United States now refused to honor.

The Supreme Court held that the government's refusal to honor the policies deprived the plaintiffs of their property without due process in violation of the Fifth Amendment.

The court stated:

> "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obliger be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. . . . When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."

Id. at 579. The court added that "Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would not be the practice of economy, but an act of repudiation." *Id.* at 580.

Plaintiffs claim that Section 106 was enacted by Congress for precisely the same reason that the legislation was struck down in *Lynch*. The federal government, according to plaintiffs, is attempting to reduce expenditures by repudiating its obligations under its Medicare contracts with the providers. This constitutional attack on Section 106 cannot be sustained. While it is undisputed that the government may not with impunity abrogate vested contractual rights, that rule does not apply here because any right to Medicare reimbursement for Hill-Burton free care is statutory and not contractual. 42 U.S.C. § 1395, *et seq.* The obligations of the government under the contractual arrangements have been fulfilled (Hill-Burton funds for new construction have been paid over by the government) and Section 106 does not abrogate any contractual obligation of the government. There is no contractual obligation requiring H.H.S. to provide Medicare reimbursement. Rather, upon joining the Medicare program, providers gain a statutory entitlement to reimbursement. 42 U.S.C. § 1395f(b). Thus the amount of reimbursement is governed not by contract but by

statute; specifically the Medicare Act's "reasonable cost" provisions. 42 U.S.C. § 1395x(v)(1)(A).

Retroactive adjustments in the Medicare reimbursement system have been declared constitutional because included in the concept of statutory entitlement to reimbursement is the possibility that the statute or implementing regulations may be changed. *Springdale Convalescent Center v. Mathews*, 545 F.2d 943, 955-57 (5th Cir. 1977). In addition, courts have recognized that "the expectations of those who enter a regulated field are diluted by the knowledge that occasional changes will be made to better carry out regulatory purposes." *Adams Nursing Home of Williamstown, Inc. v. Mathews*, 548 F.2d 1077, 1081 (1st Cir. 1977) (citing *Federal Housing Administration v. Darlington, Inc.*, 358 U.S. 84 [1958]).

Next we must address the plaintiffs' claim that Section 106 retroactively denies compensation and thus constitutes a taking of property without just compensation in violation of the Fifth Amendment. That Amendment provides in relevant part that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." In *Arlington Hosp. v. Schweiker*, 547 F.Supp. 675 (E.D. Va. 1982), the court found Section 106 constitutionally sound in the face of an attack based upon an uncompensated "taking" within the meaning of the Fifth Amendment. After balancing the nature and strength of the public interest served by Section 106 against the hospital's asserted right to reimbursement, the court found that the "strength of the public interst involved, and the relative insubstantially of the plaintiff's interest" required a holding that Section 106 is constitutional.

Plaintiffs also allege that Section 106 is not a simple clarification of existing law, but rather retroactive legislation. I disagree because "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary". *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974). Section 106 and its legislative history make clear that hospitals are not to receive reimbursement from the Medicare program for the costs incurred in providing

free care to indigents under the Hill-Burton Act. The only question remaining is whether plaintiff can demonstrate that the application of Section 106 to this case would be "manifestly unjust." The Supreme Court in *Bradley* identified three factors to be considered in the "manifest injustice" inquiry: "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." 416 U.S. at 717. I can ascertain no manifest injustice of the type comtemplated by *Bradley*. Neither the nature of the parties nor the nature of their rights is suggestive of any "manifest injustice". The hospitals' purported right to Medicare reimbursement for Hill-Burton uncompensated care costs was never expressly granted by statute or regulation. As the court in the *St. Mary of Nazareth* case stated:

> . . . this alleged right simply arises out of the hospitals' reading of the Medicare Act through rose colored glasses, a reading which is to the hospitals' pecuniary advantage . . . There is not a scintilla of proof in this record that Congress ever intended the Medicare program to reimburse hospitals for the Medicare percentage of the cost of providing medical care pursuant to their Hill-Burton obligations.

698 F.2d 1345 (1983).

The third factor noted in *Bradley*, also supports the constitutionality of Section 106 because it imposes no "additional or unforeseen obligation" on plaintiffs. 416 U.S. at 721. The denial of reimbursement imposes no additional or unforeseen obligation on plaintiffs because their claim has been repeatedly rejected throughout the lengthy administrative process and because they obligated themselves contractually to provide Hill-Burton free care. Section 106 must be sustained.

IV. CONCLUSION

I hold that the P.R.R.B. has properly interpreted Section 106 of TEFRA to preclude Medicare reimbursement to the plaintiffs in regard to their contractual obligations pursuant to the Hill-Burton Act. I further hold Section 106 to be constitutional. An appropriate order will be entered.

BY THE COURT:

EDWARD N. CAHN, J.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE GERMANTOWN HOSPITAL
AND MEDICAL CENTER, et al.
Plaintiffs,

v.

MARGARET M. HECKLER, et al.
Defendants.

Civil No. 82-5016

ORDER

AND NOW, this 30th day of September, 1983, IT IS ORDERED that judgment is entered in favor of defendants and against plaintiffs.

BY THE COURT:

EDWARD N. CAHN, J.

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MEMORIAL OSTEOPATHIC HOSPITAL, et al.
Plaintiffs

v.

MARGARET M. HECKLER, et al.
Defendants.

Civil No. 82-1414

(Judge Muir)

ORDER

March 19, 1984

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

This case arises out of a dispute over the Plaintiff Hospitals' attempt to obtain reimbursement under Part A of the Medicare Act, 42 U.S.C. §§ 1395 *et seq.*, for certain costs incurred by the Hospitals in connection with in-patient hospital services furnished to Medicare beneficiaries. The Plantiffs include hospitals which received construction subsidies under the Hill-Burton Act, 42 U.S.C. §§ 291(c) *et seq.*, and two hospital associations which joined this suit on behalf of their members. The Defendants are the Department of Health and Human Services (HHS), the Secretary of HHS and the Administrator of the Health Care Financing Administration. Presently before the Court are the parties' cross-motions for summary judgment and the Defendants' motion to dismiss the two hospital associations.

I. Facts and Background.

The primary issue in this case involves the interrelationship between the Medicare program and the Hill-Burton Act. The Hill-Burton Act authorizes the federal government to make grants, loans, and interest subsidies for hospital construction. The Plantiff Hospitals are all recipients of Hill-Burton subsidies and as a condition for the receipt of the subsidies agreed to provide certain levels of free care to indigents. The Hill-Burton Act requires the Secretary of HHS to insure that hospitals receiving Hill-Burton subsidies "furnish needed services for persons unable to pay therefor." 42 U.S.C. § 291(e). Pursuant to this directive, the Secretary has adopted regulations requiring such hospitals to provide certain levels of "uncompensated services" to indigents. 42 C.F.R. § 53.11 (1980).

Part A of the Medicare Act, 42 U.S.C. §§ 1395 *et seq.*, provides funding for hospital insurance benefits for the aged and disabled. The Plaintiff Hospitals are providers of services under Part A of the Medicare Act. Providers of Part A Medicare services receive reimbursement from the Federal Hospital Insurance Trust Fund for the "reasonable cost" of services provided persons covered by the Medicare program. 42 U.S.C. § 1395(x)(V)(1)(A). The Medicare Act delegates to the Secretary of HHS the authority to promulgate regulations to be used in determining the reasonable cost of services rendered by hospitals providing care under Part A of the Medicare Act.

The Hospital Plaintiffs sought reimbursement from the Medicare program of the costs of providing care to indigents pursuant to the Plaintiff Hospitals' Hill-Burton obligations. The Plaintiff Hospitals' claims for Medicare reimbursement were disallowed by private third-party payors entered into agreements with the Secretary of HHS and are authorized agents of the Secretary, 42 U.S.C. § 1395(h). The Plaintiff Hospitals then sought review by the Health and Human Services Provider Reimbursement Review Board of the disallowance of their claims. On October 15, 1982, the Provider Reimbursement Review Board issued a decision on the Plaintiff Hospitals' appeal upholding the agents' denials of reimbursement for the cost of Hill-Burton care to the indigent. The Provider Reimbursement Review Board based its decision on § 106 of the

Tax Equity and Fiscal Responsibility Act which was enacted into law during the pendency of the proceedings before the Provider Reimbursement Review Board. Section 106 of the Tax Equity and Fiscal Responsibility Act provides, inter alia, that the Secretary's regulations shall provide that a hosptial's costs in providing Hill-Burton care to indigents are not reimbursable under the Medicare program.

After exhausting their administrative appeals, the Plaintiff Hospitals, joined by the Plaintiff Hospital Associations, filed this lawsuit seeking judicial review of the Provider Reimbursement Review Board's decision pusuant to 42 U.S.C. § 1395oo (sic). In their complaint, the Plaintiffs challenge the constitutionality of § 106 of the Tax Equity and Fiscal Responsibility Act.

II. Plaintiffs' Constitutional Challenges to Section 106.

Plaintiffs argue in support of their motion for summary judgment that § 106 of the Tax Equity and Fiscal Responsibility Act violates the due process clause of the Fifth Amendment. First, Plaintiffs claim that § 106 unconstitutionally impairs the Plaintiffs' contract right to Medicare reimbursement. Second, Plaintiffs allege that § 106 of the Tax Equity and Fiscal Responsibility Act, by requiring recipients of Hill-Burton subsidies to participate in the Medicare program while denying them reimbursement for the costs of providing health care to Medicare beneficiaries results in the taking by the Government of property without just compensation therefor.

The Plaintiffs' argument that § 106 results in an unconstitutional interference with their contract right to Medicare reimbursement is wholly without merit. Plaintiffs' argument rests on the incorrect assumption that they possessed contract rights which were abrogated by Congress when it enacted § 106. Even assuming Plaintiffs had prior to the enactment of § 106 a right to Medicare reimbursement for the cost of Hill-Burton care to the indigent, this right was statutory and not contractural. Medicare providers enter into an "agreement" with the Secretary requiring them to abide by certain billing, hiring, and related business practices. This agreement is a unilateral assurance by Medicare providers and does not contractually obli-

gate the Secretary or any other agency of the federal government to provide Medicare reimbursement for any particular category of cost. Upon joining the Medicare program, the hospital obtains merely a statutory entitlement to reimbursement. 42 U.S.C. § 1395(f)(b). *See* American Hospital Management Corp. vs. Harris, 638 F.2d 1208 (9th Cir. 1981); Fairfax Hospital Association vs. Califano, 585 F.2d 602, 605 (4th Cir. 1978).

Intrinsic in any statutory entitlement to reimbursement is the possibility that the statute or the regulations promulgated thereunder might be changed. The Courts have repeatedly recognized this characteristic of statutory entitlements by upholding retroactive adjustments in the Medicare reimbursement system against constitutional challenges. *See* Springdale Convalescent Center vs. Mathews, 545 F.2d 943, 955-57 (5th Cir. 1977); Adams Nursing Home vs. Mathews, 548 F.2d 1077, 1081 (1st Cir. 1977). *See also* FHA vs. Darlington, Inc., 385 U.S. 84 (1958).

A second flaw in Plaintiffs' argument that § 106 constitutes an unconstitutional interference with an alleged contract right to Medicare reimbursement is that Plaintiffs never had a property expectation of reimbursement under Medicare for their Hill-Burton costs. Prior to the enactment of § 106, the Secretary of HHS had consistently asserted that the costs of Hill-Burton care to the indigent were not reimbursable under the Medicare program. Section 106 is a congressional ratification of the Secretary's interpretation of the interrelationship between the Hill-Burton Act of 1946 and the Medicare Act of 1965. Memorial Hospital vs. Schweiker, 706 F.2d 1130 (11th Cir. 1983); Johnson County Memorial Hospital vs. Schweiker, 698 F.2d 1347 (7th Cir. 1983); Beth Israel Hospital of Passaic vs. Heckler, 560 F.Supp. 1222, 1228 (D. N.J. 1983); Arlington Hospital vs. Schweiker, 547 F.Supp. 670, 615 (E.D. Va. 1982).

We also find without merit Plaintiffs' argument that § 106 constitutes an unconstitutional taking of property by the federal government without just compensation therefor. The Plaintiff Hospitals agreed as a condition of receiving Hill-Burton subsidies that they would provide free care to the indigent. Moreover, the denial of Medicare reimbursement to the Plaintiff Hospitals does not necessarily impose all Hill-Burton costs

on the Plaintiff Hospitals' general resources or force the Hospitals to operate at a loss. Plaintiff Hospitals also may seek to recover costs incurred in providing Hill-Burton care to the indigent through a variety of means including their local community's voluntary efforts and through charitable contributions if they choose to do so. Metropolitan Medical Center vs. Schweiker, 693 F.2d 775, 786 (8th Cir. 1982); Memorial Hospital v. Heckler, 706 F.2d 1130, 1137 (11th Cir. 1983); Hempstead General Hospital vs. Waylon, 474 F.Supp. 398, 409-11 (E.D. N.Y. 1979), *aff'd*, 62 F.2d 573 (2d Cir. 1980). Indeed, the legislative history of the Hill-Burton Act shows that Congress fully expected that hospitals which received Hill-Burton subsidies would seek to defray the costs of their obligation to provide care to the indigent by seeking charitable and other contributions. *See* Hearings of the Senate Committee on Education and Labor on S. 191, pp. 189-91, 91 Cong. Rec. 11793-11800.

Plaintiffs also argue that § 106 is unconstitutional because it violates their right to equal protection. By way of background, in 1981 the Court of Appeals for the Fifth Circuit in Presbyterian Hospital of Dallas vs. Schweiker, 68 F.2d 1381 (5th Cir.), *cert. denied*, 102 S.Ct. 476 (1981), held that the Presbyterian Hospital was entitled to recover for its Hill-Burton indigent care costs incurred during its 1976 fiscal year as an allowable cost under the Medicare program. In 1982, Congress enacted § 106 and excluded therefrom Hill-Burton costs which had been reimbursed under the Medicare program prior to the date of the statute "pursuant to the final court order affirmed by a United States Court of Appeals." 42 U.S.C. § 1395(V)(1)(M).

Plaintiffs assert that Congress has acted irrationally in discriminating between claims for Medicare reimbursement of Hill-Burton costs that had been allowed pursuant to a final court judgment and all other such claims for reimbursement pending at the time § 106 was enacted. We disagree. By exempting from § 106 recovery of Hill-Burton costs permitted pursuant to the holding of *Presbyterian Hospital* case, Congress has drawn a rational distinction that avoids potential constitutional difficulties which could arise from allegations that Congress was

attempting to annul court judgments that were final at the time of the enactment of § 106. It surely was not irrational for Congress to make clear that it did not intend to reopen the already settled judgments in the *Presbyterian Hospital* case or any similar cases but rather had intended through the enactment of § 106 to clarify that all other Hill-Burton claims for Medicare reimbursement may not be allowed by the Secretary. Also, I am not aware that "irrationality" is a ground for striking down an act of Congress.

Plaintiffs further challenge § 106 as unconstitutional retroactive legislation. Section 106 is merely a clarification of existing law as to the interrelationship of the Hill-Burton Act and Part A of the Medicare Act. It is not retroactive legislation. Moreover, even assuming that § 106 embodies a new rule of law a court must apply the law in effect at the time it renders a decision unless doing so would result in "manifest injustice or there is a statutory direction or legislative enactment to the contrary." Bradley vs. Richmond School Board, 416 U.S. 696, 711 (1974).

Because there is no legislative enactment or statutory direction instructing this Court to apply a law to this case other than § 106, the only question remaining is whether the Plaintiffs can demonstrate that the application of § 106 to their claims for medicare reimbursement would be "manifestly unjust." There are three factors which we are obliged to consider in determining whether the application of a law would be manifestly unjust: the nature and identity of the parties, the nature of their rights, and the nature of the impact in the change of the law upon those rights. Bradley vs. Richard School Board, 416 U.S. 696, 711 (1974). In our view, the Plaintiffs' alleged expectation that they would be reimbursed under Medicare for the costs of Hill-Burton care was irrational if it existed at all because the Secretary has consistently refused reimbursement under Medicare for such claims. There therefore is no manifest injustice in applying § 106 to the Plaintiff Hospital's claims for Medicare reimbursement.

For all of the above reasons, the Plaintiffs' motion for summary judgment will be denied and the Defendants' motion for summary judgment will be granted. Because today we grant

the Defendants' motion for summary judgment, we need not reach the Defendants' motion to dismiss the Plaintiff Hospital Associations as plaintiffs to this lawsuit.

NOW, THEREFORE, IT IS ORDERED THAT:

1. The Defendants' motion for summary judgment is granted.

2. The Clerk of Court shall enter judgment in this action in favor of the Defendants.

3. The Plaintiffs' motion for summary judgment is denied.

4. The Defendants' motion to dismiss the Plaintiff Hospital Associations' is denied as moot.

5. The Clerk of Court shall close this file.

MUIR, *U.S. District Judge*

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MEMORIAL OSTEOPATHIC HOSPITAL, et al.
Plaintiffs

v.

MARGARET M. HECKLER, et al.
Defendants.

Civil No. 82-1414

(Judge Muir)

JUDGMENT

The issues having been duly reviewed by the Honorable Malcolm Muir, United States District Judge, and a decision having been rendered this date thereon,

It is Ordered and Adjudged that judgment be and hereby is entered in favor of the Defendants Margaret M. Heckler, et al.

Dated at Williamsport, Pennsylvania, this 19th day of March, 1984.

Donald R. Berry, *Clerk of Court*

by

Sylvia Lehotsky, *Deputy Clerk*